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NO. 01-548

IN THE
SUPREME COURT OF THE UNITED STATES

SOCIETÀ COOPERTIVA L'ARCIERE,
Petitioner,

v.

TIMOTHY J. KOPKE, et al.,
Respondents.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY RESPONDENT RIUNIONE ADRIATICA di SICURTÀ S.p.A.

DANIEL J. LA FAVE
Counsel of Record
FRANK J. DAILY
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5000
Counsel for Respondent Riunione Adriaticà di Sicurta S.p.A.

23p.

CORPORATE DISCLOSURE STATEMENT

Respondent Riunione Adriatica di Sicurtà S.p.A. ("RAS") is an Italian insurance company. RAS's parent company is Allianz AG, a German corporation that is publically held. There are no other publically held companies that own 10% or more of RAS's stock.

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Respondent Riunione Adriatica di Sicurtà, S.p.A. ("RAS"), respectfully submits this brief in support of Petitioner Società Coopertiva L'Arciere's ("L'Arciere's") petition for a writ of certiorari to review a judgment and opinion of the Supreme Court of Wisconsin, dated July 10, 2001.

STATEMENT OF THE CASE

RAS believes that L'Arciere has, for the most part, adequately and accurately set forth the nature of this case, the procedural history leading up to its petition, and the pertinent facts. RAS would add, for the benefit of the Court, that it is an Italian insurance company with its principal place of business in Milan, Italy. R. 25, ¶ 7. RAS issued an insurance policy, in Italy, to the predecessor of Respondent Cartiere Binda in Liquidazione S.p.A. ("Binda"), which is the subject of a coverage dispute between the two parties. *See generally* RR. 19 and 25.

Binda is currently attempting to use the decision being challenged by L'Arciere to support Binda's efforts to overturn the trial court's dismissal of RAS on jurisdictional grounds. Binda's separate appeal has been fully briefed and is currently awaiting disposition by the Wisconsin Court of Appeals as Appeal No. 00-3008. Given the potential for the Wisconsin Supreme Court's decision to be used against RAS in connection with Binda's appeal, and because of the decision's adverse implications for many of RAS's insureds, RAS has elected to file this brief in support of L'Arciere's petition.

REASONS FOR GRANTING THE WRIT

In Wisconsin the doctrine of minimum contacts has been swept away by a stream of commerce theory that has flooded its conceptual banks. *See Kopke v. A. Hartrodt S.r.l.*, 2001 WI 99, ¶ 49, 245 Wis. 2d 396, 629 N.W.2d 662 ("If what the majority concludes qualifies as minimum contacts is indeed sufficient, then there is, in effect, nothing left of the doctrine of minimum contacts, which would limit the reach of a state court's jurisdiction.") (Crooks, J., dissenting).

While the majority's aggressive application of the stream of commerce theory in this case could well establish its high water mark, other jurisdictions throughout the country have adopted similarly expansive formulations of the rule. To be sure, there exist jurisdictional "safe harbors," courts which require something more than a vague, constructive awareness that a potentially injury producing article that a party is handling may be destined for the forum before imposing on it the considerable burdens of defending a case in a foreign legal system. However, this patchwork approach frustrates commercial enterprises–especially those operating entirely in other countries, as here–from charting out their business activities in a predictable way, one which will provide them with a reasonable measure of confidence where they are likely to be amenable to suit.

The courses that the stream of commerce theory has run in the wake of this Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) have been many and varied. *See* L'Arciere's Petition at 7 (cataloging various contexts in which the theory has been employed). The time has

come for this Court to intervene and limit the course of the stream of commerce theory so as to prevent it from submerging much of the personal jurisdiction landscape in what might be better termed an "ocean of commerce" theory. By doing so the Court can restore order and predictability to a vital body of law, one whose ripple effects extend across an ever expanding and increasingly interconnected global economy. The Court can also thereby foster more harmonious foreign relations between our nation and the rest of the international community.

I.

IT IS IMPERATIVE THAT THIS COURT RESOLVE THE SPLIT IN AUTHORITY ON THE STREAM OF COMMERCE THEORY OF PERSONAL JURISDICTION TO RESTORE ORDER AND PREDICTABILITY TO THIS VITAL BODY OF LAW.

The split in authority on the nature and scope of the stream of commerce theory is well documented. Indeed, more than 14 years ago in *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987) this Court itself highlighted the then present differing interpretations of the theory that had emerged in the aftermath of *World-Wide Volkswagen*. *Asahi*, 480 U.S. at 110-11; *see also Ruckstuhl v. Owens Corning Fiberglas Corp.*, 731 So. 2d 881, 887 n.5 (La. 1999) (collecting divided federal circuit court cases). These conceptual rifts remained after *Asahi* given the Court's inability to agree on the proper formulation and application of the theory in that case.

To be sure, *Asahi* has engendered more questions than it has answered, especially on the stream of commerce front. Some jurisdictions, such as Wisconsin, now view the stream of

commerce language from *World-Wide Volkswagen* as entrenched dogma. *See Kopke*, 2001 WI 99, ¶ 30 ("[A] majority of the Court has not rejected the stream of commerce analysis of *Burger King* and *World-Wide Volkswagen*, and it is thus binding on the lower courts.") (emphasis added). Other jurisdictions refuse to treat this language with such reverence; the Louisiana Supreme Court observing in *Ruckstuhl*, *supra*, that:

> [T]he stream of commerce theory with regard to manufacturers is dicta in *World-Wide Volkswagen* and is not binding law. Further, the attempted modification [stream of commerce plus theory] led by Justice O'Connor in *Asahi* did not receive enough votes to make it law. Therefore, **we have no Supreme Court precedent that guides us as to which theory, if either, represents the law**.

Ruckstuhl, 731 So. 2d at 889 (emphasis added).

In point of fact, the business world has been set adrift in a jurisdictional ship without a functioning compass to attempt to navigate the many tributaries of the stream of commerce theory now extant. Given the uncertainty involved, it should come as no surprise that businesses all too frequently find themselves running hard aground, as here. And, as this case illustrates, those tributaries are proliferating as courts broaden the contexts in which they apply the theory.

This is not a garden variety product liability suit, the wellspring from which the stream of commerce theory first

issued. *See World-Wide Volkswagen*, 444 U.S. at 297. Rather this case arises out of a purportedly negligently performed service, *i.e.*, the allegedly improper packing of Binda's paper in an intermodal container. The distinction is crucial. For the legitimacy of the stream of commerce theory as articulated in *World-Wide Volkswagen* is drawn from a manufacturer's or distributor's ability to *control* the marketing and sale of the product at issue. *See id.* ("if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its **products** in other States, it is not unreasonable to subject it to suit in one of those States") (emphasis added). One of the two dissenting opinions below highlighted this key distinction in underscoring the lack of any such "distribution link" here. *Kopke*, 2001 WI 99, ¶ 60 & n.5; *see also id.* at ¶¶ 53-54 & n. 3 (noting that the majority "glosses over this point" and pointing out that "L'Arciere did not create or control Binda's distribution system that brought the paper to Wisconsin") (Crooks, J., dissenting).

Other courts have been more careful to maintain the conceptual levees that keep the stream of commerce theory running true. Illustrative of these decisions is *Considine v. West Point Diary Products, Inc.*, 111 N.C. App. 427, 432 S.E.2d 412, *dismissal allowed and rev. denied*, 335 N.C. 171, 438 S.E.2d 197 (1993). There a Florida truck driver brought suit in North Carolina state court against a Nebraska dairy for injuries he sustained when several boxes of allegedly improperly loaded butter fell on him when he was attempting to make a delivery. The plaintiff asserted that the defendant was subject to suit under the stream of commerce theory, "because defendant knew

its product was going to North Carolina, evidenced by the fact that defendant filled out the bill of lading to North Carolina. Also, according to plaintiff, 21 other shipments of butter from defendant's dairy had found their way to North Carolina." *Id.* at 430, 432 S.E.2d at 414. In rejecting this argument the North Carolina Court of Appeals reasoned:

> We agree with the trial court that the "stream of commerce" analysis does not apply here. The cases which have applied the stream of commerce theory have been products liability cases, wherein a potentially defective and dangerous product has been injected into the stream of commerce. *See, e.g., Cox v. Hozelock, Ltd.*, 105 N.C. App. 52, 411 S.E.2d 640, *disc. rev. denied and appeal dismissed*, 331 N.C. 116, 414 S.E.2d 752, *and cert. denied*, 506 U.S. 824, 113 S.Ct. 78, 121 L.Ed.2d 42 (1992) (assertion of personal jurisdiction over defendant English company which had manufactured defective water sprayer, then sold its product to distributors and eventually to the North Carolina plaintiff, who was injured when it exploded in his face). The case at hand is not a products liability case. Plaintiff does not allege that the butter itself was defective in any way. Instead, plaintiff's claim is based on one alleged incident of negligence in loading the butter onto a truck in Nebraska.

111 N.C. App. at 430, 432 S.E.2d at 414.

Notably, in *Considine* it was a third party broker that was directing the distribution of the goods at issue, not the dairy. *See id.* at 428, 432 S.E.2d at 413 ("Plaintiff's trucking company was hired by a third party broker, Bert Lewis of Oakbrook, Illinois, to transport his purchase of butter from defendant's dairy to Lewis' subsequent buyers, the Campbell Soup Company in Maxton, North Carolina.").

Similarly, in *Haley v. Champion Int'l Corp.*, NO. 99-2256-JWL, 2000 WL 1472880 (D. Kan. Apr. 21, 2000) the district court recognized, in declining to exercise jurisdiction, that the allegedly negligent packer had no say in where the purportedly injurious goods were being directed. As in *Considine*, the plaintiff was a truck driver (like Respondent-Plaintiff Timothy Kopke), who was injured when his tractor-trailer overturned in route from Texas to Kansas. He asserted that Dungan Warehouse Corporation caused his accident by improperly loading his trailer with paper under the negligent supervision of the paper manufacturer, Champion International Corporation. The court found that due process limitations did not permit it to exercise jurisdiction over Dungan even though it knew the cargo's destination. In so holding, the court reasoned that:

> Dungan is a warehouse in Texas. It stores paper, which it loads and unloads onto trailers in Texas. Dungan does not direct where the paper it handles arrives from or departs to, nor is its business concerned with such locations. In this case Champion, not Dungan, determined that the paper would travel to Kansas. Plaintiff has alleged no facts which would indicate that

> Dungan made any purposeful contact with Kansas.

2000 WL 1472880, at *3. *Accord Eggear v. The Shibusawa Warehouse Co., Ltd.*, NO. CIV. A. 00-CV-4636, 2001 WL 267881, at * 1 (E.D. Pa. Mar. 19, 2001) ("The only contact that Plaintiffs allege that Shibusawa has with Pennsylvania is that Shibusawa is aware that ships that it loads in Japan are unloaded in Pennsylvania. This type of contact is insufficient to establish personal jurisdiction over Shibusawa."); *see also id.* at *3 ("'It is uncontroverted that defendants have no interest in or control over the ultimate destination of cargo loaded onto these ships.'") (quoting *Irby v. Isewan Terminal Services. Co., Ltd.*, NO. 90-2210, 1991 U.S. Dist. LEXIS 18480, at *5-*6 (E.D. Pa. Dec. 18, 1991)).

There is no principled basis for distinguishing cases such as *Considine*, *Haley*, and *Shibusawa* from this case–nor did the Wisconsin Supreme Court even try. Presumably, had this case been brought in either North Carolina state court, Kansas federal court, or the Eastern District of Pennsylvania, L'Arciere would have been dismissed under the foregoing authority. To be sure the facts of this case present an even more extreme situation than encountered in those cases, as Kopke has presented no evidence from which it can be reasonably inferred that L'Arciere should have known, much less actually knew, the destination of the subject containers. *See Kopke*, 2001 WI 99, ¶ 60 ("Kopke points to no evidence which would establish that L'Arciere should have known the containers were headed here.") (Crooks, J., dissenting). Whereas in all three of these other cases there is proof that the defendants knew where the

cargo was being shipped, yet they were still dismissed for lack of jurisdiction.

The uneven application of the stream of commerce theory and due process jurisprudence is vividly shown by the opposing results found in these four highly analogous cases. This unevenness in the law makes it virtually impossible to predict where foreign companies might be amenable to suit–an impediment that handicaps not only the business world in ordering its affairs, but unduly complicates litigation for prospective plaintiffs as well. *See Kopke*, 2001 WI 99, ¶ 65 ("If, as the majority concludes, the jurisdictional facts in this case establish minimum contacts, little predictability remains for potential plaintiffs and defendants in the present world economy.") (Crook, J., dissenting). This is the antithesis of an "orderly administration of the law," which this Court has recognized time and again as the goal of the due process clause. *See World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added), where this Court explained that:

> **The Due Process Clause, by ensuring the "orderly administration of the laws,"** *International Shoe Co. v. Washington*, 326 U.S. at 319, 66 S.Ct. at 159, **gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.**
>
> **When a corporation "purposefully avails itself of the privilege of conducting activities**

> **within the forum state,"** *Hanson v. Denckla*, 357 U.S., at 253, 78 S.Ct., at 1240, **it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation** by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

In the wake of *Asahi,* with its lack of any guiding light, litigants have been left adrift in an uncertain and increasingly turbulent stream of commerce that is frustrating the "clear notice" purpose of personal jurisdiction jurisprudence. Absent a legal beacon clearly defining when defendants may be subject to jurisdiction in this nation's courts, it will be "impossible for [them] to plan and structure their business contacts and risks." *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995). L'Arciere's situation drives this point home. It made a conscious decision not to obtain insurance for claims in the Unites States or in Canada, clearly not expecting that merely by loading containers according to Binda's preordained plan would it be subjected to suit wherever Binda chose to direct its shipments of paper. Yet notwithstanding these efforts to "structure its primary conduct," L'Arciere is being hauled into Wisconsin state court based, not on its own decision to market its services to Wisconsin consumers, but because Binda independently chose to tap into the State's market for Binda's paper goods.

It seems unfathomable that the message this Court wants delivered abroad is that all foreign companies–no matter how tangentially they are involved with the shipment of goods to

America–need to insure against the potential risk of being sued here. That is why the majority's decision below cannot stand. This Court is the only tribunal that can provide the sorely needed legal beacon to guide all litigants who endeavor to navigate America's turbulent jurisdictional waters, and stem the flood tide of the rising stream of commerce theory, which threatens to wash away the doctrine of minimum contacts. This Court needs to restore order and predictability to this vital body of law.

II.

THE MAJORITY'S DECISION IGNORES THE OMINOUS FOREIGN RELATIONS IMPLICATIONS ASSOCIATED WITH THE EXPANSIVE JURISDICTIONAL RULE IT ADOPTS.

While there was disagreement over the stream of commerce theory in *Asahi*, the Court was unified in concluding that it would be unreasonable to exercise jurisdiction over the foreign third-party defendant, Asahi. Writing for eight members of the Court, Justice O'Connor counseled that:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal interest in Government's foreign relations policies will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal

> interests on the part of the plaintiff or the forum State. **"Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."** *United States v. First National City Bank*, 379 U.S. 378, 404, 85 S.Ct. 528, 542, 13 L.Ed.2d 365 (1965) (Harlan, J., dissenting).

480 U.S. at 115 (citation omitted; emphasis added).

Unfortunately, the majority below failed to heed this admonition in asserting jurisdiction over L'Arciere. Indeed, an examination of its application of the five reasonableness factors this Court articulated in *Asahi* reveals the majority's patent disregard for any adverse foreign relations impact associated with its decision.

Of the five factors (*i.e.*, (1) the forum state's interest in adjudicating the dispute; (2) the plaintiff's interest in obtaining convenient and effective relief; (3) the burden on the defendant; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and, (5) the shared interest of the several States in furthering fundamental substantive social policies), the majority below considered only the first three. None of these factors address systemic concerns that transcend Wisconsin's borders; concerns that are embodied in factors four and five, which the majority conspicuously avoided discussing. For all one can discern in reading the majority's decision, the court simply did not care what foreign relations fallout might result from its holding.

As L'Arciere expressed in its petition, the foreign relations fallout from overly aggressive jurisdictional rules can range from foreign court's refusing to recognize judgments from our nation's courts when parties seek to enforce them abroad, to outright political, legal, and economic reprisals. L'Arciere's Petition at 17. Should the former prevail, all of the parties to the dispute would be unfairly penalized by a jurisdictional system that would be dysfunctional on both ends. On the front end, foreign defendants would bear the inordinate costs and practical burdens associated with defending themselves on foreign soil under a foreign legal system. On the back end, plaintiffs, who depend on the recognition of domestic judgments when investing heavily in pursuing their cases against foreign companies, would have the rug pulled out from under them at the last moment, adding insult to injury. Plainly such an approach would be unsatisfactory, yet it is an all too real possibility when courts become overzealous in their efforts to cater to parochial interests, as occurred here.

The risk of provoking reprisals in the international community is made all the more indefensible when one considers the dearth of any substantial parochial interests at stake here. In order to properly appreciate the straw man nature of the interests the majority identified under the first three reasonableness factors, one must first recognize a fallacious assumption that was woven into its discussion on the stream of commerce theory. In concluding that the theory should apply even though the court recognized that the case was not one involving products liability, the majority pointed out that "Kopke asserts that L'Arciere workers in Italy negligently loaded the pallet into the container that was shipped to this forum." *Kopke*, 2001 WI 99, ¶ 31. While that was certainly

true when Kopke initially joined L'Arciere, it was a position that he had abandoned long before the Wisconsin Supreme Court considered this appeal. Indeed, Kopke did not oppose L'Arciere's summary judgment motion on the merits, which it brought in conjunction with its motion to dismiss for lack of jurisdiction. *See* R. 52 (Kopke's response brief), p.4 ("Binda, not L'Arciere, is solely liable for the injuries sustained by Timothy Kopke") (emphasis added). Consequently, one is left to wonder how keeping L'Arciere in the case could vindicate Kopke's interest in obtaining effective relief, or how Wisconsin could have an "unquestionable interest" in providing Kopke with a forum to not assert liability against L'Arciere. *See Kopke*, 2001 WI 99, ¶¶ 40-41.

Kopke's abandonment of his claim against L'Arciere also undercuts the majority's attempt to distinguish this case from the reasonableness dynamics at play in *Asahi*, where all that remained at issue was a dispute between two foreign defendants over their relative fault under an indemnification agreement. *See id.* at ¶ 47 ("Kopke is still a party, and very interested" as opposed to the plaintiff in *Asahi,* who had settled out of the case). If Kopke were still interested in his claim against L'Arciere, he has a peculiar way of showing it.

In reality, the sole reason that Kopke wants to keep L'Arciere in this case is not because he thinks it has any liability, but because of his concern that Binda will attempt to use L'Arciere's "empty chair" to deflect blame at trial. *See* R. 52, p.4 ("Binda refuses to withdraw its affirmative defenses and stipulate to the dismissal of L'Arciere on the merits. . . If L'Arciere is dismissed solely on jurisdictional grounds, Binda will have the opportunity at trial to attempt to shift blame for

this accident to L'Arciere. L'Arciere will not be there to defend itself. There will be only an 'empty chair,' offering no defense to Binda's claims of L'Arciere negligence.").

This purported "empty chair" impediment is more apparent than real Empty chair defendants are not an uncommon phenomenon in Wisconsin. Unlike some states, Wisconsin law permits, for example, a worker's employer from being named on the verdict as a potential tortfeasor in a product liability suit brought by the employee against a machine manufacturer–even though the employer is immune from liability by virtue of worker's compensation law. *See, e.g., Matthies v. The Positive Safety Mfg. Co.*, 2001 WI 82, ¶ 24, 244 Wis. 2d 720, 741-42, 628 N.W.2d 842, 853-54 (discussing employer's immunity), and *Martz v. Trecker*, 193 Wis. 2d 588, 535 N.W.2d 57 (Ct. App.), *rev. denied*, 537 N.W.2d 571 (Wis. 1995), where the Wisconsin Court of Appeals stated:

> It is well-established that "when apportioning negligence a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release.

Id. at 597, 535 N.W.2d at 61 (quoting *Connar v. West Shore Equip.*, 68 Wis. 2d 42, 44-45, 227 N.W.2d 660, 662 (1975)).

Given this legal climate, plaintiffs attorneys in Wisconsin are accustomed to compensating for the "real" defendant's efforts to slough off fault onto an absent party. To

be sure, Kopke has ready means of doing that here. He has retained experts who are well versed in what L'Arciere's and Binda's workers did and did not do in connection with the subject intermodal container given the depositions that he took of representatives from both companies. *See* R. 52, p.4 ("based on their testimony, and the documents produced . . . plaintiff is satisfied that L'Arciere loaded the container in conformity with Binda's written instructions"). Armed with this testimony, there is no reason why Kopke and his experts will be unable to effectively rebut Binda's efforts to advance L'Arciere's fault as a cause with L'Arciere absent at trial.

The majority's response to all of this below was: "A strategic decision on the part of plaintiff's or defense counsel does not weigh in as a factor in our due process analysis." *Kopke*, 2001 WI 99, ¶ 41. Such an approach exalts form over substance by using an abandoned claim to artificially generate forum and litigant interests.

Instead of recognizing Kopke's nonexistent claim against L'Arciere for what it is, the majority below has constructed a straw man to prop up its interests analysis. This myth should not be the tail that wags the jurisdictional dog. Make no mistake, this emperor is not clothed with any legitimate forum or party interests.

CONCLUSION

This case presents a golden opportunity for the Court to mend the conceptual rifts in the stream of commerce theory that have plagued lower courts and litigants alike for the better part of two decades. The time is indeed ripe for "the United States

Supreme Court . . . to settle finally the scope of the stream of commerce test." *Kopke*, 2001 WI 99, ¶ 49 (Crooks, J., dissenting) (emphasis original).

Absent the Court's intervention, lower courts will continue to expand the theory's reach further and further beyond its legitimate theoretical boundaries until it has swept away any vestige of "minimum contacts." And foreign businesses will be faced with a Hobson's choice of either having to self insure for the risk of suit in a remote forum for a market in which they never sought to partake, or attempt to convince a foreign insurer to indemnify them for a virtually unquantifiable event-coverage which, assuming it could be had and was procured, could be used against them to establish purposeful availment. The potential foreign relations fallout of the majority's expansive jurisdictional rule simply cannot be ignored in light of the increasingly politically and economically interconnected nature of the international community.

Beyond the systemic ills that need to be cured, it would be a travesty of justice in this individual case to subject L'Arciere to jurisdiction, and with it the rigors of proceeding through trial in a far removed foreign judicial system, solely to mollify Kopke's tenuous trial strategy concerns-especially in view of the dearth of evidence of purposeful availment.

For all of the reasons stated above, as well as those set forth by L'Arciere, this Court should grant L'Arciere's Petition for Writ of Certiorari.

Respectfully Submitted,

Daniel J. La Fave
Counsel of Record
Frank J. Daily
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5000
Counsel for Respondent
Riunione Adriaticà di
Sicurta S.p.A.